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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST BRAY, JR.,

Defendant and Appellant.

B283962

(Los Angeles County  
Super. Ct. No. LA084553)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Richard H. Kirschner, Judge. Affirmed with  
directions.

Paul R. Kraus, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy  
Attorneys General, for Plaintiff and Respondent.

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A jury found Ernest Bray, Jr., (Bray) guilty of robbery and of assault with a deadly weapon. The trial court imposed a consecutive sentence on the assault with a deadly weapon count. Bray appealed, contending that Penal Code section 654<sup>1</sup> precluded the consecutive sentence. In an opinion filed on October 31, 2018, we rejected that contention and affirmed the judgment. Bray petitioned for review of our decision and raised newly enacted Senate Bill No. 1393 ((2017–2018 Reg. Sess.), Stats. 2018, ch. 1013, §§ 1–2). The Supreme Court granted the petition and transferred the matter to this court with the direction to vacate our decision and to reconsider the cause in light of that new law. In accordance with that order, we vacate our October 31, 2018 opinion. Although our decision regarding the judgment of conviction remains the same, we vacate Bray’s sentence and remand for resentencing.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On October 17, 2016, loss prevention agents Erik Alvarez and Hugo Jimenez were working at Jons Market. They saw Bray leave the store without paying for a bottle of vodka. Alvarez and Jimenez followed Bray outside, where they identified themselves as loss prevention agents. Bray pointed a knife at them and said, “[G]et the fuck away.” However, Bray did not thrust or “slash” the knife at Alvarez and Jimenez. When Alvarez said all he wanted was the vodka, Bray put the bottle into a nearby shopping cart and left.

Based on this event, an amended information charged Bray with robbery (§ 211; count 1) and assault with a deadly weapon (§ 245, subd. (a)(1); count 2). He was also charged with personal

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<sup>1</sup> All further statutory references are to the Penal Code.

use of a dangerous and deadly weapon (§ 12022, subd. (b)(1)) as to count 1. Both counts identified only Alvarez as the sole victim. A jury found Bray guilty of both counts and, as to the robbery, found true the weapon allegation (§ 12022, subd. (b)(1)). The verdict forms also identified Alvarez as the victim in both counts.

On July 14, 2017, the trial court sentenced Bray to two years on the robbery plus two 5-year terms under section 667, subdivision (a)(1).<sup>2</sup> On the assault with a deadly weapon count, the trial court sentenced Bray to a consecutive one year. Bray's total sentence therefore was 13 years.

## DISCUSSION

I. The multiple victim exception to section 654 applies

Bray contends the trial court erred by imposing the one-year sentence consecutively on count 2 instead of staying it under section 654. The People counter that the sentence was proper under the multiple victim exception. As we now explain, we conclude that the multiple victim exception applies, and therefore the consecutive sentence was proper.

Section 654, subdivision (a), provides that “[a]n act or omission . . . punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but [not] . . . under more than one provision.” The section thus bars multiple punishments for offenses arising out of a single occurrence where all were incident to an indivisible course of conduct or a single objective.

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<sup>2</sup> The trial court struck the punishment for the weapon allegation.

(*People v. Correa* (2012) 54 Cal.4th 331, 335; *People v. Jones* (2012) 54 Cal.4th 350, 358.)

However, “section 654 does not apply to ‘crimes . . . against multiple victims.’ ” (*People v. King* (1993) 5 Cal.4th 59, 78; *People v. Oates* (2004) 32 Cal.4th 1048, 1062; *People v. Centers* (1999) 73 Cal.App.4th 84, 99 (*Centers*).) “ ‘The purpose of the protection against multiple punishment is to insure that the defendant’s punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not “. . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual.” ’ ” (*Oates*, at p. 1063.) Thus, the multiple victim exception applies so long as each violent offense involves at least one different victim. (*People v. Miller* (1977) 18 Cal.3d 873, 886, fn. 11; *People v. Robinson* (1988) 198 Cal.App.3d 674, 680.)

Here, the People do not dispute that the robbery and assault with a deadly weapon were part of an indivisible course of conduct, and therefore section 654 would generally apply. The People instead argue that the multiple victim exception to that general rule applies because the evidence showed that Bray

committed an act of violence<sup>3</sup> against multiple victims: Alvarez and Jimenez. Bray responds that the multiple victim exception does not apply because the information and verdicts identified only one victim: Alvarez.

The People have the better argument, under *Centers, supra*, 73 Cal.App.4th 84. In *Centers*, the defendant entered a residence and kidnapped one of its three occupants. Consecutive sentencing on both the burglary<sup>4</sup> and kidnapping charges was permissible because, although the information did not allege the specific victims of the burglary, there was evidence that at least one victim of the burglary was not a victim of the kidnapping. (*Id.* at pp. 101–102.) The court said, “We know of no case in which the court declined to apply the multiple victim exception simply because the victims had not been named in the information. Ordinarily, in determining whether . . . section 654 applies, the trial court is entitled to make any necessary factual findings not already made by the jury.” (*Id.* at p. 101.) Thus, where substantial evidence supports a trial court’s implied finding of multiple victims, section 654 does not apply. (*Ibid.*; see *People v. Cardenas* (2015) 239 Cal.App.4th 220, 232, fn. 4 [insufficient evidence second person was present at time of offense].)

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<sup>3</sup> Robbery and assault involve acts of violence. (*People v. Newman* (2015) 238 Cal.App.4th 103, 117.)

<sup>4</sup> Although burglary is not a violent crime for purposes of the multiple victim exception, it may be treated as one where, as in *Centers, supra*, 73 Cal.App.4th at page 99, the jury found that the defendant inflicted great bodily injury in the commission of the burglary.

Under *Centers, supra*, 73 Cal.App.4th 84, that the information and verdicts here identified only Alvarez as the victim of the robbery and of the assault with a deadly weapon is not a bar to consecutive sentencing. Stated otherwise, naming Alvarez as the victim in the information and verdicts did not preclude a finding that Jimenez was also a victim for the purposes of the multiple victim exception. That is particularly true where, as here, jury instructions did not identify Alvarez as the sole victim but instead referred to a “store employee” for the purposes of robbery and to a “person” for the purposes of assault with a deadly weapon, and where the prosecutor never argued in closing that Alvarez was the only victim but instead talked about *both* loss prevention agents.

Finally, substantial evidence supports the trial court’s implied finding that Jimenez was also a victim of robbery and of assault with a deadly weapon. (See generally *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Both Alvarez and Jimenez testified they followed Bray out of the store and that Bray pointed a knife at them. Bray does not challenge the sufficiency of this evidence to establish Jimenez was a victim of Bray’s crimes for the purposes of the multiple victim exception.

## II. Senate Bill No. 1393

Effective January 1, 2019, the Legislature amended sections 667 and 1385 to give trial courts the discretion to strike or to dismiss a prior serious felony conviction for sentencing purposes. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.), Stats. 2018, ch. 1013, §§ 1–2.) That amendment applies to cases, such as this one, not final when the amendments became operative. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) The People concede that remand is necessary so that the trial

court can exercise its discretion under the new law as to the two 5-year terms.

**DISPOSITION**

The sentence is vacated and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

GOODMAN, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.